TEOH LEAN FATT

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
VC GEORGE J
[ORIGINATING SUMMONS NO. 31-379 OF 1988]
4 JUNE 1989

CRIMINAL PROCEDURE: *Initial order of detention - Subsequent order of restricted residence - Whether detention order illegal - Orders to be effected within reasonable time - Effect of illegal order - Sections 3, 4(2) Emergency (Public Order & Prevention of Crime) Ordinance 1969 - Restricted Residence Enactment, ss 2(i), (ii), 3(i), (ii), (iii).*

The plaintiff T in this case was arrested under a detention order dated 8 November 1987 issued by the Home Minister pursuant to s. 2(i) of the Restricted Residence Enactment (the Enactment); whereby he was detained at Taiping prison.

In this originating summons, T questioned the validity and legality of the issue of the warrant of arrest and the detention order. T contended that:

(a) the detention at the Ipoh Police Station was illegal in that the order was for the plaintiff to be detained at Taiping prison;

(b) the continued detention of the plaintiff from after the 19th and up to 24 December 1987 at Taiping prison was illegal in that the Deputy Minister had made the s. 2(ii) Restricted Residence Order for the plaintiff to be released at Tangkak on 19 December 1987.

On 19 December 1987, a further order under s. 2(i) of the Enactment was issued whereby T was ordered to reside restrictively for 5 years in Tangkak in Johor. T was only taken to Tangkak on 24 December 1987.

Held:

[1] Although s. 2 does not prescribe time limits it cannot but be that each of the various steps to be taken pursuant to this section and the implementation of each of the consequential orders made pursuant thereto had to be effected within a reasonable time.

[2] (a) Deputy Superintendent is a Senior Police Officer holding at the relevant time the responsible position of officer-in-charge of detention and retention of detainees under the Restricted Residence Enactment;

(b) he must have realised that T was being held in Taiping prison pursuant to preventive detention provisions pending the decision of the Minister (or the Deputy Minister) to be made pursuant to s. 2(ii) of the Enactment;

(c) he should also have realised that once the said order of 19 December had been made T was entitled to be released albeit into the area in which his residence was to be restricted and that any unreasonable delay in so releasing him could result in his being illegally detained.

[3] In this day and age with the benefit of the telephone and the availability of fast motor vehicles suitable for long journeys it is inexcusable that although it was on a Saturday that the Minister issued his order, arrangements were not made and implemented to the end that T was released in Tangkak on the next day, Sunday, or on the following Monday 21 December or at the latest on Tuesday 22 December.

[4] Not to release T till Thursday 24 December has amounted to T having been illegally detained from at least (if not earlier) the evening of 22 December until he was released on 24 December.

[5] Following the *ratio decidendi* in the Edgar Joseph Jr. J judgment in *Koh Yoke Koon* and the judicial authorities chosen and cited by Edgar Joseph Jr. J in that case, T's detention for at least two days (if not more) was not in accordance within the law and the continued restriction placed on T should not be allowed.

[T ordered to be freed.]

Cases referred to:
Aminah v. Superintendent of Prisons, Kelantan [1968] 1 MLJ 92
In Re Datuk James Wong Kim Min [1976] 2 MLJ 245
In Re Tan Boon Liat @ Allen & Anor. et al. [1977] 2 MLJ 108
Ooi Ah Phua v. Officer-in-Charge of Criminal Investigations, Kedah/Perlis [1975] 2 MLJ 198
PP v. Mah Chuen Lim & Others [1975] 1 MLJ 95
Public Prosecutor v. Koh Yoke Koon [1988] 1 CLJ (Rep) 269
Reverend Thomas Pelham Dale's Case [1881] 6 QBD 376
Yit Hon Kit v. Minister of Home Affairs [1988] 2 MLJ 638

Legislation referred to:
Emergency (Public Order & Prevention of Crime) Ordinance 1969, ss. 3(5), 4(2)
Federal Constitution, art. 5(1)
Interpretation Act 1967, ss. 2, 54(2)
Interpretation and General Clauses Ordinance 1948, s. 38
Restricted Residence Enactment (FMS Cap 39), ss. 2(i), (ii), 3(i), (ii), (iii)
Rules of the High Court 1980, O. 15 r. 16

For the plaintiff - C. Fernando; M/s. Gunaretnam & Co.
For the defendants - Md. Raus bin Sharif, Senior Federal Counsel

JUDGMENT

VC George J:

In exercising the powers of the Minister under the Restricted Residence Enactment (Cap. 39) the Deputy Minister of Home Affairs pursuant to s. 2(i) of the Enactment issued an order for the arrest of Teoh Lean Fatt the plaintiff herein and for his detention at the Taiping Prison with directions in the order for the Superintendent of the Prison "to detain the said Teoh Lean Fatt in safe custody in civil prison until you shall receive further orders through me". The order was dated 23 September 1987.

The plaintiff was only arrested in the late morning of 8 November 1987 at Ipoh and was taken to the Central Police Station at Ipoh where he was detained in the lock-up until the following morning when he was taken to Taiping Prison and handed into the custody of the Superintendent to be detained at the prison pursuant to the terms of the said order.

Further to the said arrest and detention of the plaintiff, the Deputy Minister, on 19 December 1987, in purported exercise of his powers under s. 2(ii) of the Enactment, issued a further order directed to the prison authorities at Taiping Prison and to the police, to the effect that the plaintiff, then detained at Taiping Prison, do, for the term of 5 years from 19 December 1987, reside within the town of Tangkak in the District of Muar, Johore. It is to be noted that s. 3(ii) of the Enactment provides that the persons to whom the order was directed are required to have the detainee released from custody within the boundaries of the area his residence is restricted to.

Although the order was dated and issued on 19 December 1987 it was only on 24 December 1987 that the plaintiff was taken from Taiping Prison and released in the town of Tangkak.

By this originating summons, presumably brought pursuant to O. 15 r. 16 RHC, the plaintiff invokes Article 5(1) of the Federal Constitution:

> No person shall be deprived of his life or personal liberty save in accordance with law.

and seeks the answers to a number of questions said to arise out of the orders made by the Deputy Minister. However, at the hearing Counsel for the plaintiff in effect restricted the issues to the contention that the issue of the warrant of arrest, the detention order made and the plaintiff's subsequent detention are illegal and contrary to law on the grounds that the detention at the Ipoh Police Station was illegal in that the order was for the plaintiff to be detained at Taiping Prison and that in any event the continued detention of the plaintiff from after the 19th and up to 24 December 1987 at Taiping Prison was illegal in that the Deputy Minister had made the s. 2(ii) Restricted Residence Order for the plaintiff to be released at Tangkak on 19 December 1987.

Inspector Lim Boon Leong was the police officer who had the plaintiff arrested. He explains in an affidavit, encl. (16), that the arrest of the plaintiff was effected about 11.15 am. on 8 November 1987 which being a Sunday it was not possible to make proper arrangements to have the plaintiff escorted from Ipoh to Taiping prison and accordingly he was detained in the police lock-up at Ipoh until the following morning when he was escorted and handed over to the Taiping Prison authorities.

As to the detention at Taiping prison from 19 to 24 December 1987, although the Deputy Minister had issued the Restricted Residence Order on 19 December 1987 restricting the plaintiff to Tangkak and the police were duly informed of this on that date presumably for them to have the order executed, Deputy Superintendent of Police Pow Kim Guan explained by his affidavit, encl. (17), that as the police were only informed of the issuance of the order at about 12.30 pm on 19 December 1987 which being a Saturday and as such a half working day, the order was only collected from the Ministry on Monday 21 December. He went on to explain that arrangements had to be made to escort the plaintiff from Taiping to Tangkak and it was only at about 2 pm on 24 December that the police could escort the plaintiff to Tangkak. In a further affidavit Deputy Superintendent Pow states that having collected the order (and another pertaining to police supervision) from the Ministry on 21 December they were sent to Ipoh Police Headquarters where they were received only on 23 December after which the Ipoh Police made an arrangements to have the plaintiff escorted to Tangkak on the 24 December.

Although s. 2 does not prescribe time limits it cannot but be that each of the various steps to be taken pursuant to this section and the implementation of each of the consequential orders made pursuant thereto had to be effected within a reasonable time. Section 3(i) provides that when any s. 2(ii) order had been made with reference to any person, he shall be taken before the Superintendent or District Superintendent of the prison in which he is detained who will inform him of the terms of the order and deliver to him a copy thereof and shall require him to state where he desires to reside within the area he is restricted to. Section 3(iii) goes on to provide that "as soon as may be" after action has been taken under s. 3(i) the Superintendent shall hand over the person to the police for him to be released in the area he is restricted to. "As soon as may be" has been held to mean "as nearly as is reasonable in the circumstances" - see *Aminah v. Superintendent of Prisons, Kelantan* [1968] 1 MLJ 92 which was followed in *Yit Hon Kit v. Minister of Home Affairs* [1988] 2 MLJ 638, 641.

In *Ooi Ah Phua v. Officer-in-Charge of Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198, 201 Suffian LP in giving the judgment of the Federal Court referred with approval to the views of Syed Othman J in *PP v. Mah Chuen Lim & Others* [1975] 1 MLJ 95, 96 expressed as follows:

> The Constitution does not prescribe the time within which the arrested person shall be allowed to consult Counsel. Section 38 of the Interpretation and General Clauses Ordinance 1948, which applies to the Constitution (see eleventh schedule) reads:
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> > When no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.
> >
> > (A similar provision can be found in s. 54(2) of the Interpretation Act 1967, which applies to legislation set out in s. 2).
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> What is 'convenient speed' would depend on the circumstances of each particular case. I do not think it is desirable to lay down the speed convenient to all cases.

In my judgment after the arrest of the plaintiff in all the circumstances and particularly having in mind that he was arrested on a Sunday it cannot be said that the plaintiff was not handed over to the custody of the prison authorities at Taiping with all convenient speed. Since between the time he was arrested and the time he could with all convenient speed be handed over to the prison authorities at Taiping he had to be kept in custody, *per se* detaining him at the lock-up at the Ipoh Police Station until he could be taken to Taiping (with all convenient speed) does not in my judgment run foul of Article 5(1).

What is left then is the complaint of the continued detention of the plaintiff after the order of 19 December 1987 was issued.

On the same day that the order was issued a senior officer at the Ministry of Home Affairs informed Deputy Superintendent Pow Kim Guan of that fact. The Deputy Superintendent is a Senior Police Officer holding at the relevant time the responsible position of officer-in-charge of detention and retention of detainees under the Restricted Residence Enactment. He should and I am certain that he must have realised that the plaintiff was being held in Taiping Prison pursuant to preventive detention provisions pending the decision of the Minister (or the Deputy Minister) to be made pursuant to s. 2(ii) of the Enactment. He should also have realised that once the said order of 19 December had been made the plaintiff was entitled to be released albeit into the area in which his residence was to be restricted and that any unreasonable delay in so releasing him could result in his being illegally detained.

It seems to me that in this day and age with the benefit of the telephone and the availability of fast motor vehicles suitable for long journeys it is inexcusable that although it was on a Saturday that the Minister issued his order, arrangements were not made and implemented to the end that the plaintiff was released in Tangkak on the next day, Sunday, or on the following Monday 21 December or at the latest on Tuesday 22 December. At p. 250 in *In Re Datuk James Wong Kim Min* [1976] 2 MLJ 245, Lee Hun Hoe CJ said:

> Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a Court of law in which he is proved to have committed an offence punishable under certain provisions of the penal law. Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the Court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly

> construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors.*
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> One of the functions of the Courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, Article 5(1) of the Constitution guarantees that "no person shall be deprived...of his liberty except in accordance with the law." If this constitution guarantee is to have any real meaning at all, then it is imperative that the Courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

Not to release the plaintiff till Thursday 24 December has, in my judgment, amounted to the plaintiff having been illegally detained from at least (if not earlier) the evening of 22 December until he was released on 24 December.

The question that arises is what effect has such a finding on the Restricted Residence Order that had been made in respect of the plaintiff.

In *Re Tan Boon Liat @ Allen & Anor. et al.* [1977] 2 MLJ 108, 110 the Federal Court refereed with approval to two passages from the *Reverend Thomas Pelham Dale's Case* [1881] 6 QBD 376 at 441, 469 the former passage being an observation by Brett LJ:

> Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue.

and the latter from the judgment of Cotton LJ:

> I quite agree with Brett LJ that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance.

In *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269, Hashim Yeop A. Sani SCJ (as he then was) in reading the judgment of the Supreme Court, said at p. 271:

> Detention not in accordance with law is inconsistent with the fundamental right guaranteed under Article 5(1) of the Constitution. Where a law deals with detention, there are abundant authorities to show that the provisions of such a law must be construed strictly and in the case of doubt the Court should lean in favour of the subject.

Koh Yoke Koon had been arrested and kept in police custody pending enquiries under s. 3 of the Emergency (Public Order & Prevention of Crime) Ordinance 1969. A detention order under s. 4 of that Ordinance was duly signed by the Deputy Minister authorising the detention of Koh for a period of two years from 12 December 1986 at the Pulau Jerejak Rehabilitation Centre. The order was served on the prisoner Koh then in custody at the Muar Police Station and he was continued to be detained at Muar Police Station from 14 December 1986 until some time in the morning of 16 December 1986 when he was removed to the centre. Section 4(2) of the Ordinance provides:

4(2) Every person detained in pursuance of a detention order shall be detained in such place as the Minister may direct and in accordance with instructions issued by the Minister and any rules made under subs.(3).

The contention in *Koh's* case made on his behalf was that the detention at Muar Police Station from 14 December 1980 to 16 December 1980 was, in the face of the detention order that provided for Koh's detention at the Pulau Jerejak Rehabilitation Centre, illegal. The executive in *Koh's* case sought to rely on certain deeming provisions provided by s. 3(5). The learned trial Judge, Edgar Joseph Jr. J, held that the deeming provisions was in respect of a maximum of 60 days during which the detainee could be detained pending the Minister's decision as to the future detention and found that the 60 days had been expired on 13 December 1986 and that accordingly "the deeming provisions in s. 3(5) does not bite." The learned Judge went on to state:

The result is that the applicant's period of detention in police custody at the Muar police station from 14 December 1986, until some time in the morning of 16 December 1986, when he was removed to the centre was wholly unauthorised and therefore in violation of Article 5(1) as being otherwise than in accordance with law.

The detention order will not operate to salvage the case for the detaining authority for it specifically provided for detention at the centre for two years from 12 December 1986 and cannot therefore have the effect of rendering legal the applicant's illegal detention at the Muar police station from 14 December 1986 until his removal therefore on the morning of 16 December 1986.

The learned trial Judge went on to hold that because of the two days illegal detention of Koh at Muar Police Station his continued detention at the Pulau Jerejak Rehabilitation Centre was illegal. He relied *inter alia* on *Re Tan Boon Liat* and the said passages quoted therein from the judgment of Brett LJ and Cotton LJ to find that the detention of Koh was not procured by steps all of which were entirely regular nor was he satisfied that every step in the process which led to Koh's detention was followed with extreme regularity and went on to hold that therefore the Court should not allow the imprisonment to continue.

The *ratio decidendi* in the judgment of Edgar Joseph Jr. J found favour with the Supreme Court and its judgment (a passage from which was cited herebefore) went on to say in the penultimate paragraph thereof:

We therefore agree with the learned Judge that for the period 14 December 1986 until the morning of 16 December 1986 the respondent cannot be said to be in lawful custody or detention. We also agree with the learned Judge that in the circumstances of this case the continued detention of the respondent should not be allowed.

Following the *ratio decidendi* in the Edgar Joseph Jr. J judgment in *Koh Yoke Koon* (which as has been seen had the approbation of the Supreme Court) and in the judicial authorities chosen and cited by Edgar Joseph Jr. J in that case from "the anthology of cases" that could be cited including the passages referred to herebefore from the *Reverend Thomas Palham Dale's* case, having found as I have that the plaintiff's detention for at least two days (if not more) was not in accordance within the law, I have to find and hold as I do that the continued restriction placed on the plaintiff should not be allowed. The plaintiff is entitled to be freed from all the restrictions imposed on him by the order of 19 December 1987 of the Deputy Minister and I so declare.

Also found at [1991] 2 CLJ 1218